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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

ZIMMERN BEHARRY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR CERTIORARI REVIEW

On Petition for Certiorari to the United States Court of Appeals for the Eleventh Circuit

RHONDA A. ANDERSON, ESQ.
RHONDA A. ANDERSON, P.A.
COUNSEL FOR ZIMMERN BEHARRY
2222 PONCE DE LEON BLVD, SUITE 500
CORAL GABLES, FLORIDA 33134
TELEPHONE: (305) 444-1400

44pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether, in light of this Court's ruling in ***Apprendi v. New Jersey***, 530 U.S. 466 (2000), and/or ***Jones v. United States***, 526 U.S. 277 (1999), the Petitioner was properly sentenced to life imprisonment where:

A. The drug quantity was neither presented to the Grand Jury, charged in the indictment, nor submitted to the petit jury to be found beyond reasonable doubt thus depriving the sentencing court of a jurisdictional framework with which to sentence the defendant to more than the maximum of 20 years provided by the respective default provisions of 21 U.S.C. §§ 841(b)(1)(C) or 960(b)(3)?

B. The Petitioner was indicted and convicted of violating 21 U.S.C. §841(a)(1), and 21 U.S.C. §952(a), with no mention or notice of quantity, but was sentenced for different, additional and uncharged drug importation, possession and distribution offenses in excess of 5 kilograms of cocaine in violation of 21 U.S.C. §§ 841(b)(1)(A) and 960(b)(1)(B)?

C. The Eleventh Circuit's strict application of the substantial prejudice prong in "plain error" review of ***Apprendi*** issues in *pre-**Apprendi*** cases, conflicts with a majority of the Circuit Court's of Appeal, and violated the Petitioner's due process rights where the Petitioner lodged general and specific objections at sentencing to the trial court basing his sentence upon drug quantities not charged in the Indictment or found by the jury beyond a reasonable doubt?

D. The sentencing court, over defense counsel's expressed objections, attributed to Petitioner drug quantities beyond the two events for which Petitioner was convicted, and where some the additional quantities were alleged to be part of a

broad conspiracy on which the jury did not reach a verdict, and some were from alleged importations outside the time period of the charged conspiracy?

E. The Eleventh Circuit's use of counsel's alternative argument at sentencing as a basis for affirming the Petitioner's sentence and conviction violates due process where such arguments were presented merely to rebut the Government's position and trial court's rulings that uncharged drug quantities be attributed to the Petitioner to increase his sentencing exposure?

II. Whether the trial court erred when it *Allen* charged the jury after the jury informed the court that they were deadlocked after reaching a verdict on one count, that such a deadlock was unanimous, and one juror had previously requested a bailiff because she feared for her safety due to the conduct of the other jurors?

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A. The drug quantity was neither presented to the Grand Jury, charged in the indictment, nor submitted to the petit jury to be found beyond reasonable doubt thus depriving the sentencing court of a jurisdictional framework with which to sentence the defendant to more than the maximum of 20 years provided by the respective default provisions of 21 U.S.C. §§ 841(b)(1)(C) or 960(b)(3). Amount of drugs that a defendant intended to conspire and/or possess with

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OPINIONS BELOW

The unpublished *per curiam* opinion of the Eleventh Circuit affirming Petitioner's conviction was entered on July 6, 2001. ***United States v. Beharry***, 265 F.3d 1062 (11th Cir.(Fla.))(Table, No. 00-11371). (Pet.App. "1" at 22-30). The Eleventh Circuit's unpublished order denying Petitioner's Motion for Rehearing *en banc* was entered on October 22, 2001, ***United States v. Beharry,*** — F.3d —(11th Cir.(Fla.))(Table, No. 00-11371-JJ), and the Eleventh Circuit's mandate issued on October 30, 2001). (Pet.App. "1" at 59-61)

The appeal to the Eleventh Circuit arose from Petitioner's Judgment and Commitment entered on March 13, 2000, after a jury trial. (Pet.App. "1" at 8-21).

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh was entered on July 6, 2001. A timely Petition for Rehearing and Rehearing *En Banc* was filed on September 14, 2001, and on October 22, 2001, the Eleventh Circuit entered an order denying said Petition. (Pet.App. "1" at 60). Thereafter, on October 30, 2001, the Eleventh Circuit issued a Mandate on its Judgment. (Pet.App."1" at 61). The jurisdiction of this Court to review a the judgment of the Eleventh Circuit is conferred under Title 28 U.S.C. § 1254(1) and Sup.Ct.Rule 10.

CONSTITUTIONAL PROVISIONS & STATUTES

U. S. Const., amend V

All Constitutional Provisions and Statutes are set forth in Appendix "1."

IN THE
SUPREME COURT OF THE UNITED STATES
No. _____

ZIMMERN BEHARRY,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Zimmern Beharry, Defendant and Appellant in the courts below, respectfully petitions for a writ of certiorari to review the Judgment of the United States Court of Appeal for the Eleventh Circuit entered in this case on March 11, 2000, and Order entered on October 22, 2001, denying his Petition for Rehearing and Suggestion for Rehearing *En Banc*. In his appeal to the Eleventh Circuit, *Zimmern Beharry* specifically argued that the quantity of drugs attributed to him violated ***Apprendi v. New Jersey,*** 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and/or ***Jones v. United States,*** 526 U.S. 277, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999).(See, i.e., Pet. App. "1" at 38-61).

STATEMENT OF THE CASE

Zimmern Beharry was initially indicted on ten counts of various narcotics trafficking offenses. Specifically, Mr. Beharry was charged with conspiracy with intent to possess and import cocaine into the United States and various importations and possession counts related to the conspiracy. All of the counts referred to "a mixture or substance containing a detectable amount of cocaine." Thereafter, the Government sought to extradite Mr. Beharry from the Republic of Trinidad-Tobago. Significantly, the Court in Trinidad did not merely rubber-stamp the United States' extradition request. Instead, the Trinidadian Court refused to extradite on counts nine and

ten, finding insufficient evidence to support those counts.[1]

Before trial, the district court (Hurley, J.) dismissed without prejudice two of the remaining eight counts on venue grounds (Indictment Counts 2 & 6). Petitioner proceeded to trial on the remaining six counts which were renumbered as follows: (1) conspiring to import cocaine into the United States from September 1, 1993, to February 10, 1994, in violation of 21 U.S.C. §§ 952(a), 963; (2) importing cocaine into the United States on February 2, 1994, in violation of 21 U.S.C. § 952(a) and 18 U.S.C. § 2; (3) importing cocaine into the United States on February 10, 1994, in violation of 21 U.S.C. § 952(a) and 18 U.S.C. § 2; (4) conspiracy to possess cocaine from September 1, 1993, to February 10, 1994, in violation of 21 U.S.C. § 846; (5) possession of cocaine on February 2, 1994, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. § 2; and (6) possession of cocaine on February 10, 1994, in violation of 21 U.S.C. § 842(a)(1) and 18 U.S.C. § 2. None of these charges alleged a specific quantity of cocaine.

Significantly, at trial during the cross examination of DEA Special Agent Edward Duffy, it was discovered that he (Agent Duffy), Special Agent Mancini and AUSA Boma had submitted knowingly false affidavits, regarding the existence of a confidential informant, in support of Mr. Beharry's extradition to the Trinidadian Court. Moreover, such knowingly false information was also submitted by way of testimony in open court at a related federal trial and to the respective grand juries.

After a jury trial in which Mr. Beharry contested his involvement in *any* drug related activity, and in which the issue of quantity of cocaine with respect to which Mr. Beharry was criminally liable was not submitted to the jury for its unanimous, beyond a reasonable doubt determination, Mr. Beharry was found guilty of the two possession and two importation counts stemming specifically and wholly from the September 2, 1994, and September 10, 1994, incidents. Specifically, the jury found Mr. Beharry guilty of Counts

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[1]The counts as listed on the jury's sheet (R-514) and the judgment of conviction (Pet. App. "1" at 8-21) are numbered differently from the counts in the fifth superseding indictment (R-179).

2, 3, 5, and 6, and was unable to reach a verdict on both of the substantive and broader conspiracy charges of Counts 1 and 4.[2]

Prior to returning the verdicts, on Friday, October 29, 1999, after three and half days of deliberations, the district court received several notes from the jury. The first note stated that "we have considered only one count and we are stuck." (R-585-2810). The second note stated that Juror 8 "does not feel safe in the jury room" and needed the bailiff. (R-585-2810). Thereafter, the district judge spoke to Juror 8 (Carol Best) out of the presence of the other jurors during which Ms. Best expressed fear for her physical safety and that she believed the confrontations "could move to something more physical." (R-585-2834-36). The district court decided to adjourn until Monday, November 1, 1999, hoping to give the jurors a time to cool-off. (R-585-2838). The district court also cautioned jurors to be civil to one another during deliberations. (R-585-2840).

Thereafter, on Monday, November 1, 1999, the jury resumed deliberations. The District Court then received a note stating that "we are unanimous on Count 5, we are hung on Counts 2, 3, 4, and 6, and feel we cannot make anymore progress, this is unanimous. (R-586-2846). Thereupon, over defense counsel's objection that it would be unduly coercive and single out juror 8, the district court gave the jury a modified *Allen* charge. (R-586-2856-57). The district court denied the defense motion for a mistrial. (R-586-2867). The jury returned the guilty verdicts on Counts 2, 3, 5, and 6 later that same day.

At sentencing, over defense counsel's expressed and specific objection, the court held Mr. Beharry responsible for a total of 263 kilograms of cocaine making the Guideline base level 38. The district court found this drug quantity by a preponderance of the evidence. To arrive at this amount, the court found Mr. Beharry liable for additional 217 kilograms of cocaine beyond the two importation and possession counts for which he was found guilty. Moreover, Petitioner's sentencing liability extended beyond the scope of the broader conspiracy counts for which he was extradited.

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[2]These remaining counts were later dismissed. (R-549, 554).

Based upon these findings, Mr. Beharry was sentenced to life in prison notwithstanding the indictment's failure to charge him specifically with any particular quantity of cocaine and the failure of the district court to submit the quantity issue to the jury for its determination beyond a reasonable doubt. Although, Mr. Beharry's sentencing was conducted on March 10, 1999, prior to this Court's opinions in ***Jones v. United States,*** 526 U.S. 227 (1999); ***Castillo v. United States,*** 530 U.S. 120 (2000); and ***Apprendi v. New Jersey,*** 530 U.S. 466 (2000), defense counsel did raise objections during the sentencing proceedings to the trial court's sentencing Mr. Beharry for drug quantities with which he was not charged by the grand jury or convicted by the petit jury.

ARGUMENTS

I. IN LIGHT OF THIS COURT'S RULING IN *APPRENDI vs. NEW JERSEY,* 530 U.S. 466 (2000), AND/OR *JONES vs. UNITED STATES,* 526 U.S. 277 (1999), THE PETITIONER WAS IMPROPERLY SENTENCED TO LIFE IMPRISONMENT WHERE:

A. The drug quantity was neither presented to the Grand Jury, charged in the indictment, nor submitted to the petit jury to be found beyond reasonable doubt thus depriving the sentencing court of a jurisdictional framework with which to sentence the defendant to more than the maximum of 20 years provided by the respective default provisions of 21 U.S.C. §§ 841(b)(1)(C) or 960(b)(3).

B. The Petitioner was indicted and convicted of violating 21 U.S.C. §841(a)(1), and 21 U.S.C. §952(a), with no mention or notice of quantity, but was sentenced for different, additional and uncharged drug importation, possession and distribution offenses in excess of 5 kilograms of cocaine in violation of 21 U.S.C. §§ 841(b)(1)(A) and 960(b)(1)(B).

In ***Apprendi***, this Court established a rule of Constitutional law of general applicability, mandated by the Due Process Clause of the Fifth Amendment and by the notice and jury trial guarantees of the Sixth Amendment: "[A]ny fact (other than a prior conviction)

that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." 530 U.S. at 476, *quoting* ***Jones,*** 526 U.S. at 243, n. 6. At issue in ***Apprendi*** was a New Jersey "hate crime" statute, which provided for an enhanced term of imprisonment if a trial judge found by a preponderance of the evidence that the defendant committed the underlying crime. This Court framed the question presented as: "whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt?" ***Apprendi,*** 530 U.S. at 469. The Court's analysis drew upon rules of criminal practice and procedure existing at the time the Constitution and the Bill of Rights were drafted, with particular emphasis on the role of the indictment in constraining the trial court's sentencing powers. The Court noted that "[a]ny possible distinction between an 'element' of a felony and a 'sentencing' factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by the court as it existed during the years surrounding our nation's founding." ***Apprendi,*** 530 U.S. at 478. At common law, the Court continued:

> [j]ust as the circumstances of the crime and the intent of the defendant at the time of the commission were often essential elements to be alleged in the indictment, *so too were the circumstances mandating a particular punishment. "Where a statute annexes a higher degree of punishment to a common law felony, if committed under particular circumstances, an indictment for the offense, in order to bring the defendant within that higher degree of punishment, must expressly charge it to have been committed under those circumstances, and must state the circumstances with certainty and precision."*

Id. at 480, (internal citations omitted)(emphasis added). This history, the Court concluded, "point[s] to a single, consistent conclusion:"

> The judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury. Put simply, facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition "elements" of a separate legal offense.

Id. at 483, n. 10 (emphasis added). *See also id.* at 499 (Scalia, J., concurring)("all facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by a jury")(emphasis in original). *Id.* at 501 (Thomas, J., concurring)("One need only look to the kind, degree, or range of punishment to which the prosecution is by law entitled for a given set of facts. Each fact necessary for that entitlement is an element").

The applicability of ***Apprendi*** to the instant case is clear. The counts upon which Mr. Beharry was found guilty referenced only a "detectable amount of cocaine." No drug quantity was alleged in the indictment other than "a detectable amount of cocaine." *Not one* overt act listed any quantity of drugs. Moreover, the issue of quantity of drugs was never submitted to the jury. In the context of §§ 841 and 960, where the quantity of drugs are not charged in the indictment, a defendant has not been charged with a crime punishable under §§ 841(b)(1)(B), or under 960(b)(1)(B), (b)(2)(B). It follows, therefore, that the Petitioner cannot constitutionally be sentenced to more than the maximum of 20 years provided in the respective default provisions of those statutes, §§ 841(b)(1)(C) or 960(b)(3), which do not require any particular amount of controlled substance to be charged or proven. Where the indictment alleges only the lesser offense, sentencing Mr. Beharry for the uncharged, greater offenses, was effectively a constructive amendment of the indictment, which under ***Ex Parte Bain,*** 121U.S.1(1887)[3], ***Stirone v. United States,*** 361 U.S. 212 (1960)[4], and ***Russell v. United States,***

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[3]The failure of the Grand Jury to charge the defendant with the elements of an offense is a jurisdictional bar to prosecution for that offense which has been settled by this Court since its decision in ***Bain:*** an indictment found by the grand jury is "indispensable to the power of the court to try the petitioner for the crime with which he is charged." *Id.* 121 U.S. at 12.

[4]This Court explicitly reaffirmed ***Bain*** in ***Stirone***, explaining that the very purpose of the Fifth Amendment grand jury clause was to limit a defendant's "jeopardy to offenses charged by a group of his fellow citizens acting independently of either the prosecuting attorney or judge." *Id.* at 218. Here, the Court concluded that the deprivation of the defendant's "substantial right to be tried only on charges presented in an indictment returned by a grand jury...is far too serious to be...dismissed as harmless error." *Id.* at 217.

369 U.S. 749 (1960)[5] *is forbidden.*[6] Mr. Beharry was therefore sentenced to life imprisonment on these counts in violation of the due process and grand jury clauses of the Fifth Amendment and of the jury trial guarantee of the Sixth Amendment. These constitutional violations require reversal of Mr. Beharry's conviction without a showing of prejudice. *See* ***Stirone*** at 217.

C. The Eleventh Circuit's strict application of the substantial prejudice prong in "plain error" review of *Apprendi* issues in *pre-Apprendi* cases, conflicts with a majority of the Circuit Court's of Appeal, and violated the Petitioner's due process rights where the Petitioner lodged general and specific objections at sentencing to the trial court basing his sentence upon drug quantities not charged in the Indictment or found by the jury beyond a reasonable doubt.

The Eleventh Circuit recently acknowledged that it has not yet found any ***Apprendi*** error to fit within the scope of the plain error doctrine, and that in order for an ***Apprendi*** error to be preserved in a *pre-**Apprendi*** case, counsel's objections at sentencing must mirror this Court's ***Apprendi*** decision, even if such argument ran counter to circuit precedent at the time. See, ***United States v. Ardley,*** 273 F.3d 991, 992, 996 (11th Cir. 2001).

In the case *sub judice,* defense counsel repeatedly objected during all proceedings to the trial court's imputation of drug quantities. Among the numerous objections which counsel raised

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[5]The principle of ***Bain*** and ***Stirone***—that an indictment charging all of the essential elements is a prerequisite to conviction for that offense—was again reaffirmed in ***Russell*** at 764-65 ("an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, *unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense to be punished;*")(internal citations omitted, emphasis added). This principle was reaffirmed in ***Apprendi*** itself: "[t]he judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury." *Id.* 530 U.S. at 483, n. 10.

[6]It is a "well settled rule in the federal courts that an indictment may not be amended except by resubmission to the grand jury, unless the change is merely a matter of form." ***Russell v. United States,*** 369 U.S. 749, 770 (1962), *citing* ***Bain*** at 10, ***United States v. Norris,*** 281 U.S. 619, 622 (1930), *and* ***Stirone*** at 218.

regarding drug quantities, prior to, and at sentencing,[7] defense counsel affirmatively and specifically objected to drug amounts not stated in the indictment or submitted to the jury as follows:

> ...we say the findings that the Court made regarding the amounts of cocaine that were not presented at the trial or *in the indictment* cannot be used as relevant conduct, and thereby cannot be used to increase the guideline level.

(Emphasis added)(R-587-2959).

> [R]egarding [testimony presented at sentencing]...it is testimony that was not presented at trial, thereby, Mr. Beharry did not obtain *Fifth and Sixth Amendment rights that he normally would in a trial,* but now is coming in to add on many years to his sentence...I would submit...that the Government must prove this by clear and convincing evidence.

(Emphasis added)(R-587-2947-48).

The above pre-***Apprendi*** objections were sufficient to notify the lower court that the Petitioner objected to all drug quantities that were not charged in the indictment and not found by the petit jury beyond a reasonable doubt.[8] The objection preserved the error as to the precise legal analysis required under ***Apprendi***. To assume otherwise places an impermissible burden on a defendant. *See* ***United States v. Thomas,*** 429 F.2d 407, 408 (5th Cir. 1970), *per curiam* (holding that "[a]n appellate court will not review actions of omission or commission by a trial court unless the defendant makes

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[7]A constitutional objection for ***Apprendi*** purposes is timely if a defendant makes the objection at sentencing. *See* ***United States v. Smith,*** 240 F.3d 927, 929 (11th Cir. 2001). *See also* ***United States v. Garcia-Guizar,*** 234 F.3d 483, 488 (9th Cir. 2000)(reviewing defendant's sentence under preserved error review where the defendant "argued in his sentencing memorandum that the amount of drugs for which he was to be sentenced had to be pleaded [in the indictment] and found by a jury beyond a reasonable doubt").

[8]The trial and sentencing proceedings in the instant case took place *before* ***Apprendi*** was decided and thus, defense counsel was bound by Eleventh Circuit precedent which would have made a request that the jury determine drug quantity specious.

known to the court the action which he desires the court to take and the grounds therefore").[9] In ***Thomas,*** trial counsel failed to make any objection to the trial court's ruling regarding an issue arising during direct examination. While a specific objection may be necessary to preserve an objection to evidentiary issues, *see* Fed.R.Evid. 103(a)(1), a general objection should generally suffice to preserve error relating to the sufficiency of the evidence, *see* Fed.R.Crim.P. 29 & 47. As specificity is not required by Rule 29 or by Rule 47, a general motion for a judgment of acquittal is a proper method to challenge the sufficiency of the evidence. Here, Mr. Beharry challenged the drug amounts by direct objection, in objections to the PSR, in a post-Government case-in-chief motion for acquittal *and* in numerous of post-trial motions. Thus, Mr. Beharry has preserved his objection to the trial court's ***Apprendi*** error. *See* ***United States v. Boyd,*** 54 F.3d 868 (D.C. Cir. 1995)(holding where the defendant fails to object or to state specific grounds for overruled objection, Court of Appeals may reverse only for plain error unless the defendant can demonstrate on appeal that ground for objection was obvious from context in which it was made). *See also* ***United States v. Dennis***, 786 F.2d 1029 (1986)(holding that to preserve an issue for later consideration by the appellate court, "one must raise an objection that is sufficient to apprise the trial court and the opposing party of the particular grounds upon which appellate relief will later be sought"), *citing,* ***United States v. Haynes,*** 573 F.2d 236, 241 (5th Cir.), *cert. denied,* 439 U.S. 850 (1978). Thus, in a pre-***Apprendi*** sentencing proceeding, the objections raised by the Petitioner were sufficient as to drug amounts not charged in the indictment and found by the jury. Moreover, the ***Apprendi*** argument was raised on direct appeal and in a Petition for Rehearing *En Banc* in the lower court utilizing the arguments made by trial counsel.

Even assuming arguendo that an ***Apprendi*** error was not adequately preserved, Mr. Beharry is nevertheless entitled to relief under the plain error standard of review because the circumstances surrounding a life sentence imposed satisfy the plain error standard of review this Court announced in ***United States v. Olano,*** 507 U.S. 725, (1993). Error is *plain* if it affected the defendant's *substantial rights* and, if it error seriously *affects the fairness, integrity or public*

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[9]The Eleventh Circuit, in the *en banc* decision, ***Bonner v. City of Prichard,*** 661 F.2d 1206, 1209 (11th Cir. 1981), adopted as precedent decisions of the former 5th Circuit rendered prior to October 1, 1981.

reputation of judicial proceedings. Id. at 732. Inasmuch as the lower court in its *per curiam* unpublished opinion in the instant case acknowledged that ***Apprendi*** related plain error had occurred,[10] Petitioner focuses the following arguments on the affects on his substantial rights and the fairness, integrity or public reputation of judicial proceedings prongs.

Mr. Beharry was indicted, tried and found guilty of violating 21 U.S.C. § 841(a)(1), and 21 U.S.C. § 952(a), with no mention or notice of quantity, but was sentenced to life imprisonment for different, additional and *uncharged* drug importation, possession and distribution offenses in excess of 5 kilograms of cocaine in violation of 21 U.S.C. §§ 841(b)(1)(A) and 960(b)(1)(B). Mr. Beharry's sentence, which exceeds the statutory maximum of 20 years under § 841(b)(1)(C) and § 960 (b)(3) authorized by the jury's verdict, clearly affects his substantial rights. An error that will cause Mr. Beharry to spend untold years in prison, beyond that authorized by the jury's verdict, necessarily affects his substantial rights.

In non-***Apprendi*** contexts, courts of appeal have not hesitated to conclude that an error resulting in an increase in the defendant's sentence affected the defendant's substantial rights. *See, e.g.*, ***United States v. Anderson,*** 201 F.3d 1145, 1152 (9th Cir. 2000) ("An error that results in a longer sentence undoubtably affects substantial rights"); ***United States v. Martinez-Rios,*** 143 F.3d 662, 676 (2nd Cir. 1998)(finding clerical error which increased defendant's sentence by several months to affect substantial rights). Indeed, this Court recently held in ***Glover v. United States,*** 531 U.S. 198 (2001), that an increase in a defendant's sentence of at least *six months* was prejudicial in relation to an ineffective assistance of counsel claim under ***Strickland v. Washington,*** 446 U.S. 668 (1984). Of relevance here, this Court noted that "any amount of actual jail time has Sixth Amendment significance." ***Glover,*** 531 U.S. at 203. *See also* ***United States v. Knight,*** 266 F.3d 303 (3rd Cir. 2001)(holding application of an incorrect sentencing guideline range affected substantial rights and was plain error even though sentence was also within correct range).

In ***Apprendi*** violation cases, numerous courts have recognized that extra prison time affects substantial rights. In ***United States v. Norby,*** 225 F.3d 1053, 1060 (9th Cir. 2000), the court stated

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[10]*See* ***Beharry*** 265 F.3d 1062. *See also Pet.* App. "1" at 22-32, 11th Cir., opinion, *7.

that "[f]ive additional years of imprisonment were imposed beyond that authorized by this verdict, which easily affected [defendant's] substantial rights." It reiterated that holding the following year in ***United States v. Buckland,*** 259 F.3d 1157,1168, *reh'g en banc granted,* 265 F.3d 1085 (9th Cir. 2001)("Imposing a sentence that is seven years more than permitted under the facts as found by the jury undoubtably seriously affects the fairness, integrity or public reputation of judicial proceedings."). Moreover, the Tenth Circuit in ***United States v. Jones,*** 235 F.3d 1231 (10th Cir. 2000), recognized that it "regularly found reversible error when the sentence imposed by the district court exceeded the statutory maximum penalty applicable to the offense of conviction." *Id.* at 1238. Even courts that did not ultimately reverse on the basis of ***Apprendi*** error have recognized that prison sentences in excess of the applicable maximum affect substantial rights. *See* ***United States v. Promise,*** 255 F.3d 150, 160-61 (4th Cir. 2001); *see also* ***United States v. Mietus,*** 237 F.3d 866, 875 (7th Cir. 2001)(assuming that ***Apprendi*** error that increased a defendant's sentence by 7 years affected his substantial rights).

Because the Eleventh Circuit's opinion in the instant case would leave intact a sentence beyond the statutory maximum that was neither based on the statute with which he was charged, nor based on a jury finding under the beyond-a-reasonable-doubt standard, thereby ignoring established constitutional principles, Mr. Beharry cannot see how the effect could be other than to impugn the "fairness, integrity and public reputation" of the judicial process. The fact that the Eleventh Circuit (among others, as discussed *infra*) condones a process by which judges routinely usurp a determination within a jury's province, strikes at the reputation of the judicial proceedings in the instant case. Such a procedure undermines, indeed nullifies, the long tradition in American constitutional criminal jurisprudence that it is the jury, rather than the judge, that must determine the offense for which the defendant has been sentenced and that it must so find beyond a reasonable doubt. Thus, in this regard Mr. Beharry is entitled, at the very least, to be resentenced under the so-called catchall[11] statutes of 21 U.S.C. §§

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[11]***See United States v. Trout,*** 68 F.3d 1276, 1280 (11th Cir. 1995)(describing § 841(b)(1)(C) as a "catchall provision"); *see also* ***United States v. Houle,*** 237 F.3d 71, 79 (1st Cir. 2001)("Section 841(b)(1)(C), the statutory catchall[,] authorizes a term of imprisonment').

841(b)(1)(C) and 960(b)(3) respectively, in order that a constitutionally prescribed sentencing scheme may be applied to the instant case.

Applying ***Apprendi*** to such sentencing schemes, a growing number of circuit courts have come to understand that if a defendant has not been charged with an aggravated quantity offense, he may not be sentenced for one—regardless of how compelling the Appellate Court finds the evidence as to quantity presented at trial. Nevertheless, a significant circuit split remains within the federal judiciary regarding this issue. The various Circuit rulings turn generally on a number of respective factors with circuit splitting results: (a) where the quantity was charged in the indictment but *not* submitted to the jury; (b) where the quantity was neither charged in the indictment *nor* submitted to the jury; (c) whether the failure to charge quantity in the indictment and/or submit such to the jury created an inherent structural defect depriving the court of jurisdiction to *try* the defendant; and (d) whether the failure to charge quantity in the indictment and/or submit such to the jury created an inherent structural defect depriving the court of jurisdiction to *sentence* the defendant.

The District of Columbia, First, Third, Seventh and Eleventh Circuit Courts have generally held that failure to charge quantity in the indictment is not a jurisdictional defect, and that such error is subject to plain error review where the sentence will not be overturned when the evidence as to quantity adduced at trial is "overwhelming" or "whether the evidence was sufficiently conclusive to support the sentence actually imposed." (*See* Circuit by Circuit analysis, *infra*). As the instant case originated in the Eleventh Circuit Court, this Court should note that the lower court, feeling itself constrained to follow ***Neder v. United States,*** 527 U.S. 1 (1999),[12] joined with the First and Seventh Circuits, to reach the astounding conclusion that an appellate court can be confident in retrospect that a grand jury *would* have returned an indictment charging the requisite quantity whenever the trial evidence was so strong that the petit jury *would* have been bound to reach the same conclusion. *See* ***McCoy v. United States,*** 266 F.3d 1245, 1251 (11th Cir., 2001), *quoting* ***United States v. Martinez,*** 258 F.3d 582, 587 (7th Cir., 2001). In doing so, these lower courts have impermissibly

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[12]Erroneous jury instructions that omit element of the offense is subject to harmless error analysis; ***Neder*** 527 U.S. at 10.

replaced *all* constitutionally required triers of fact with their pure speculation about a hypothetical jury's action.[13] In these circuits, rather than remand for resentencing to a sentence that does not exceed the statutory maximum, the courts have devised a rationale[14] that was arrived at in an unconstitutional manner. Following the sentencing rationale of these circuits would enable the Government to charge and convict a defendant of manslaughter, but sentence him for murder, and, as long as the Government produced evidence at trial that would support that sentence, the lower courts would not notice or correct such an error under F.R.Crim.P. Rule 52(b) and require resentencing in accordance with the jury's verdict. These circuits have, by and large, failed to appreciate the dispositive difference between ***Apprendi*** cases in which quantity *is* charged in the indictment and those in which it is *not*. Even if it is true that, where quantity was charged in the indictment, an ***Apprendi*** error in failing to submit the quantity to the jury "is in material respects indistinguishable" from the failure to submit the materiality element with which this Court was concerned in ***Neder***, as some courts have concluded, the same cannot be said when quantity is *not* charged in the indictment. In ***Neder***, the defendant was found guilty beyond a reasonable doubt of every element of the offense with which he was charged.

The instant case, by contrast, does not involve merely a failure to submit an element of the *charged* offense to the jury, but rather, like ***Apprendi,*** it involves the complete *failure to charge at all the offense for which Mr. Beharry was sentenced.* In such a case, there simply is no framework in which a trial for a greater offense

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[13]*See* ***Smith v. United States,*** 360 U.S. 1, 9 (1959)("the substantial safeguards to those charged with serious crimes cannot be eradicated under the guise of technical departures from the rules"). *See also* ***Sullivan v. Louisiana,*** 508 U.S. 275, 310 (1993)(finding that where an instructional error consists of a misdescription of the burden of proof, "a reviewing court can only engage in pure speculation [regarding] what a reasonable jury would have done. And when it does that, 'the wrong entity judge[s] the defendant guilty'"), *internal citations omitted*; ***Sullivan v. Louisiana,*** 508 U.S. 275, 280 (1993)(in a case finding that defective reasonable doubt instructions to the jury constituted structural error, this Court held that "[t]he Sixth Amendment requires more than appellate speculation about a hypothetical jury's action...").

[14]It is respectfully submitted that such a rationale is pure boot-strapping to achieve a desired result.

may proceed or within which the defendant may be sentenced for the greater offense—a quintessential structural error. *See* ***Arizona v. Fulminante,*** 499 U.S. 279, 310 (1991)(holding that structural errors which affect the framework in the way a criminal trial proceeds, as opposed to simply an error in the trial process itself, is not subject to the harmless error analysis).

The Second, Fourth, Fifth, Sixth, Eight, Ninth and Tenth Circuits, on the other hand, have generally recognized the jurisdictional defect inherent in indictments which do not specify quantity, and the concomitant prohibition on sentencing the defendant for an offense greater than that charged by the grand jury. Those of the above that have not explicitly recognized jurisdictional defects in such a process, have alternately applied the plain error factors, prescribed in ***Olano v. United States,*** 507 U.S. 725 (1993), as plain error *per se*. Petitioner respectfully suggests that such is the only correct result consistent with the Fifth Amendment grand jury guarantee.

Circuit Modes of *Apprendi* Error Analysis:

a. District of Columbia:

Plain Error determined by the *lower court's* view of the evidence adduced at trial:

In ***United States v. Fields,*** 242 F.3d 393, 396 (D.C. Cir.), *aff'd and amended on reh'g,* 251 F.3d 1041, 1043 (D.C. Cir. 2001), the court held that "[i]n light of ***Apprendi***, it is now clear that in drug cases under 21 U.S.C. §§ 841 and 846, before a defendant can be sentenced to any of the progressively higher statutory maximums that are based on progressively higher quantities of drugs...the Government must state the drug type and quantity in the indictment, submit the required evidence to the jury, and prove the relevant drug quantity beyond a reasonable doubt." Reviewing under the plain error standard, the court vacated Fields' sentence finding that "given the gravity of the sentence and lack of any 'overwhelming' evidence to support it, [the court has] no basis for concluding that the error did not 'seriously affect the fairness, integrity or public reputation of judicial proceedings.'" ***Fields II*** 251 at 1045, *quoting* ***Johnson v. United States,*** 520 U.S. 461, 466-67 (1997). In a later case, the court, applying the same analysis, declined to grant relief because it found the evidence of drug quantity *was* overwhelming and had not been contested at trial or sentencing. ***United States v. Webb,*** 255 F.3d 890, 900-01 (D.C. Cir. 2001).

b. ***The First Circuit:***

Plain Error determined by the *lower court's* view of the evidence adduced at trial:

The First Circuit reviews ***Apprendi*** for plain error and declines to find that the defendant's substantial rights were violated if the evidence of drug quantity at trial was such that a reasonable jury could not have failed to find the requisite quantity beyond a reasonable doubt. *See e.g.*, ***United States v. Patrick,*** 248 F.3d 11, 28 (1st Cir.), *cert. denied,* 122 S.Ct. 620 (2001); ***United States v. Terry,*** 240 F.3d 65, 72-75 (1st Cir.), *cert. denied,* 121 S.Ct. 1965 (2001). In ***United States v. Mojica-Baez,*** 229 F.3d 292 (1st Cir.), *cert. denied,* 121 S.Ct. 2215 (2001), the First Circuit decided a case in which defendants challenged their sentences under 18 U.S.C. § 924(c) on the ground that, because the indictment failed to charge the type of firearm involved, they could not be sentenced on the basis of a judicial finding that a semiautomatic weapon was used in the offense. The court concluded that the error was not structural in nature, *id.* at 309-10, but that, on the contrary, it was compelled by ***Neder v. United States,*** 527 U.S. 1 (1999), to apply plain error review, even though ***Neder*** was concerned with the failure to instruct the petit jury rather than, as in the case before it, with failure of the grand jury to charge an element of the offense. *Id.* at 311. The difference, the court indicated, was not significant where the indictment provided the defendant with fair notice of the charges before him. *Id.* The court reasoned that the indictment's failure to charge use of an automatic weapon could, in the court's estimation, be disregarded as inconsequential because the petit jury would have undoubtably convicted the defendant of using an automatic weapon. The court arrived at this *reasoning* even though it conceded that it had no idea whether evidence regarding the use of a semiautomatic weapon was ever submitted to the grand jury. The First Circuit has applied ***Mojica-Baez*** in the ***Apprendi*** context. *See* ***Terry,*** 240 F.3d at 74.

c. ***The Second Circuit:***

Plain Error/ *per se* reversible:

The Second Circuit considered the impact of ***Apprendi*** on sentencing under § 841 and the appropriate appellate standard of review where the error was not preserved at trial in ***United States v. Thomas,*** - F.3d -, 2001 WL 1579993 (2nd Cir. Dec. 12, 2001)(No. 98-1051), *en banc.* The court held that "if the type and quantity of drugs involved in a charged crime may be used to impose a sentence above the statutory maximum for an indeterminate quantity of drugs, then

the type and quantity of drugs is an element of the offense that must be charged in the indictment and submitted to the jury." *Id.* at *1. The Court further concluded, overruling its decision in ***United States v. Tran,*** 234 F.3d 798 (2nd Cir. 2000), that both failure to charge drug type and quantity in the indictment and failure to submit the issue to the jury are subject to plain error review when the issue was not raised in the district court. ***Thomas,*** *supra,* at *5-7.

Applying the plain error standard, the court found that the district court in ***Thomas*** committed error which was "plain." The court then turned to the question whether the error violated Thomas' "substantial rights," noting, but not deciding, the question whether the error was one in sentencing or, instead, an error in both trial and sentencing. *Id.* at *9. The court did not find it necessary to resolve that issue because it concluded that, under either alternative, Thomas' substantial rights were violated. If the error was one in sentencing, a sentence which exceeded the 240 month statutory maximum by 52 months "as a direct result of the error of using a drug quantity neither charged nor found by the jury, constitutes prejudice. *Id.* If, on the other hand, the error was one in Thomas' conviction, he was convicted of a crime not charged by the grand jury and had, therefore, been subjected to what was in effect a constructive amendment of the indictment in violation of the principles articulated by this Court in ***Stirone v. United States,*** 361 U.S. 212 (1960), and ***Ex parte Bain***, 121 U.S. 1 (1887). *See* notes,. 4, 5, 6, *ante*. The court concluded, "if we regard the error in this case as conviction of the defendant of an offense other than the offense with which he was charged in the indictment, then we are led to the conclusion that the error in this case was also prejudicial *per se."*

Finally, the court found that the error seriously affected both the fairness and public reputation of judicial proceedings in the case before it; the former because Thomas was prepared to contest drug quantity at sentencing and the error deprived him of the opportunity to do so, and the latter because:

> the error in this case can be seen as an error in sentencing—*i.e., the district court imposing a sentence that it had no actual authority to impose.* It can also be seen as an error in *conviction—i.e., as the conviction of a defendant for a crime different than the crime charged in the indictment* and for which an element that the defendant was demonstrably prepared to contest was *decided by the*

judge by a preponderance-of-the-preponderance-of-the-evidence standard rather than by a jury beyond reasonable doubt.

Id. at *12 (emphasis added).

d. The Third Circuit:

Plain Error determined on the court's view of the evidence adduced by the court at trial:

The Third Circuit considered ***Apprendi*** issues *en banc* in ***United States v. Vazquez,*** 271 F.3d 93 (3rd Cir. 2001). Since the indictment charged Vazquez with, among other things, conspiracy to possess more than 5 kilograms of cocaine, the court was not presented with the issues which arise from failure to charge the quantity element in the indictment. Applying the plain error standard, the court concluded that the error in failing to submit the drug quantity issue to the jury was "plain." *Id.* at 99-100. In analyzing the substantial rights inquiry, the court concluded that the error was a combined trial/sentencing error because both trial and sentencing error are inextricably intertwined and, as such, should be evaluated against the entire record. *Id.* at 101-02. The court also found this approach in accordance with, if not dictated by, ***Neder*** and ***Johnson***, both of which involved a failure to submit an essential element of the offense to the jury. Under this inquiry, the appellate court would not remedy the plain error if "the evidence was sufficiently conclusive to support the sentence actually imposed." *Id.* Relief would, however, be available "if the defendant contested the omitted element and raised evidence sufficient to support a contrary finding." *Id., quoting* ***Neder,*** 527 U.S. at 19. The court proceeded to deny relief concluding that the evidence established the requisite quantities beyond a reasonable doubt. *Id.* at 104.

e. The Fourth Circuit:

Plain Error is *per se* reversible and finding jurisdictional defect when quantity is not charged in the indictment:

The Fourth Circuit considered ***Apprendi*** *en banc* in ***United States v. Promise,*** 255 F.3d 150, 160 (4th Cir.)(*en banc*), *petition for cert. filed,* - U.S.L.W. - (U.S. Sept. 20, 2001)(No. 01-6368), a case in which quantity was not charged in the indictment or submitted to the jury but the defendant was sentenced to 360 months' imprisonment. Subsequent to *Promise*, a divided panel of the Fourth Circuit, drawing heavily on the dissenting opinion in *Promise*, vacated the convictions of defendants who were sentenced to more than the default statutory maximum, concluding that, where quantity

was not charged in the indictment, the defect inherent in sentencing a defendant for a crime with which he was not charged is so fundamental as to *always* require correction under the plain error standard, no matter how strong the quantity evidence at trial. ***United States v. Cotton,*** 261 F.3d 397, 403-407 (4th Cir.), *cert. granted,* 2002 WL 10623, 70 USLW 3348 (U.S. Jan. 04, 2002)(No. 01-687). The defect, according to the majority, was jurisdictional in nature. *Id.* at 405.

f. ***The Fifth Circuit:***

Consistently corrects error where quantity was *not* charged in the indictment finding jurisdictional defect in the imposition of a sentence exceeding the statutory maximum of the offense charged in the indictment:

See ***United States v. Gonzalez,*** 259 F.3d, 360-61, n. 3 (5th Cir. 2001). *See also,* ***United States v. Baptiste,*** 264 F.3d 578, 593-95 (5th Cir. 2001).

g. ***The Sixth Circuit:***

Per se reversible error where the indictment does not charge the quantity of controlled substances and the defendant is sentenced within the sentencing range of an aggravated § 841 offense:

See, e.g., ***United States v. Ramirez,*** 242 F.3d 348 (6th Cir. 2001). *See also* ***Gibson v. United States,*** 271 F.3d 247 (6th Cir. 2001); ***United States v. Flowal,*** 234 F.3d 932 (6th Cir. 2000). *But see* ***United States v. King,*** 272 F.3d 366 (6th Cir. 2001)(*affirming* where defendant sentenced to less than the 20 year maximum under the default provision of 21 U.S.C. § 841(b)(1)(C)), *Id.* at 377, and (where defendant objected at sentencing and the PSR only that the amount in question was closer to 300 grams rather than one kilogram of actual methamphetamine), *Id.* at 378.

h. ***The Seventh Circuit:***

Rejects ***Apprendi*** based argument that district courts lack subject matter jurisdiction to try the defendant:[15]

See ***United States v. Bjorkman,*** 270 F.3d 482, 490 (7th Cir. 2001). *See also* ***United States v. Brough,*** 243 F.3d 1078, 1079-80 (7th Cir.

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[15]In the instant case, Mr. Beharry does not contend, solely, that an ***Apprendi*** error deprives the district court of jurisdiction to *try* a defendant (the issue expressly addressed by the 7th Circuit), but also, whether such an error deprives the district court of jurisdiction to *sentence* a defendant for a greater offense than that with which he was charged or of which he was convicted.

2001)(holding that quantity is not a "real element" of the offense).

i. ***The Eighth Circuit:***

Reversible error found whenever quantity is not charged in the indictment:

The standard here is very much like that in the Fourth and Fifth Circuits: where quantity was not charged in the indictment and the defendant was sentenced in excess of the default statutory maximum, a sentence violates the defendant's substantial right to be tried only on the charges presented in an indictment returned by the grand jury and is reversible. *See* ***United States v. Maynie,*** 257 F.3d 908, 921 (8th Cir. 2001)("judge lacks the authority to sentence a defendant to an uncharged crime"). *See also* ***United States v. Frazier,*** 2001 WL 1359243 (8th Cir. 2001) at *13 (no effect on defendant's substantial rights where indictment charged requisite quantity to trigger sentence imposed, even though such quantity was not submitted to the jury for a beyond-a-reasonable-doubt determination).

j. ***The Ninth Circuit:***

In ***United States v. Buckland,*** 259 F.3d 1157, 1163-68 (9th Cir.), *reh'g en banc granted,* 265 F.3d 1085 (9th Cir. 2001) a divided panel of the Ninth Circuit held that 21 U.S.C. § 841 was facially unconstitutional because the "structure of the statute itself and the history clearly evince congressional intent that drug quantity be a sentencing factor, not an element of the offense," *Id.* at 1165, and because §§ 841(b)(1)(A), (b)(1)(C) permit the district court to find quantity by preponderance of the evidence, thus violating the due process principles articulated in ***Apprendi***. *Id.* A later panel of the Ninth Circuit vacated sentences in excess of the default statutory maximum where quantity was not charged in the indictment because the sentences "exceed[ed] the statutory maximum for the crime of which the jury has found the defendant guilty." ***United States v. Rodriguez,*** 262 F.3d 1024, 1025-26 (9th Cir. 2001).

k. ***The Tenth Circuit:***

The Tenth Circuit has held that ***Apprendi*** error, where the greater offense is not charged in the indictment, requires resentencing on the lesser offense, without harmless or plain error review, as such sentences are "unauthorized." ***United States v. Jackson,*** 240 F.3d 1245, 1248-49 (10th Cir.), *cert. denied,* 122 S.Ct. 112 (2001); ***United States v. Jones,*** 235 F.3d 1231, 1233 (10th Cir. 2000). *But cf.* ***United States v. Cernobyl,*** 255 F.3d 1215 (10th Cir. 2001)(sentence vacated under plain error standard).

L. The Eleventh Circuit:

The Eleventh Circuit held in ***McCoy v. United States,*** 266 F.3d 1245 (11th Cir. 2001), that ***Apprendi*** errors are not jurisdictional. Even though the indictment did not charge the quantity, the Court analogized the defect to the instructional error in ***Neder*** and felt itself, therefore, constrained to follow ***Neder***, as had the *First* and *Seventh* Circuits, and to subject the error to plain error review. ***McCoy*** at 1250-51. Like the Seventh Circuit, the court regarded the jurisdictional question as one relating to the district court's power to *try* the defendant at all and did not focus upon the district court's power to *sentence* a defendant for an offense of which he was neither charged nor convicted. *Id.* at 1252-54. The court also rejected any notion that ***Stirone*** had any applicability in the ***Apprendi*** error context. *Id.* at 1254.

The court expanded on ***McCoy*** in its *en banc* opinion in ***United States v. Sanchez,*** 269 F.3d 1250 (11th Cir. 2001), in which it concluded that ***Apprendi*** error, even where quantity was not charged, is not structural because it is analogous to the instructional error in ***Neder***, ***Sanchez*** at 1272-73, nor is it jurisdictional because it does not implicate the power of the court to adjudicate at all. *Id.* at 1273. According to the Eleventh Circuit, quantity is not really an element of the offense and need not be charged in the indictment; *id.* at 1278-79; the failure to charge quantity only becomes problematic when the judge sentences the defendant to a sentence in excess of that provided in 21 U.S.C. § 841(b)(1)(C). *Id.* at 1277-80. Judge Barkett, concurred in the results of both ***McCoy*** and ***Sanchez*** but would have found in both that because drug quantity is an element of the crimes punishable by 21 U.S.C. §§ 841(b)(1)(A), (b)(1)(B), and because the district court's jurisdiction is limited to the offense charged in the indictment, failure to charge drug quantity is a *jurisdictional* bar to the imposition of any *sentence* in excess of 20 years, ***McCoy*** 266 F.3d at 1261-1266, and that such a sentence is invalid. *Id.* at 1268. Such a sentence, moreover, constructively amends the indictment "in just as substantial a manner as that prohibited in ***Stirone***, and thus, as in ***Stirone***, the error is *per se* reversible." *Id. See also* ***Sanchez*** at 1304-1316.

D. The sentencing court violated the Petitioner's Sixth Amendment rights where, over defense counsels expressed objections, the court attributed to Petitioner drug quantities beyond those of two events for which Petitioner was

convicted, and where some of those additional quantities were alleged to be part of a conspiracy on which the jury could not reach a verdict, and some were from alleged importations outside the time period of the instant conspiracy.

At sentencing, over defense counsel's repeated and specific objections, the court found an additional 217 kilograms of cocaine (over and above the 47 kilograms of cocaine the court attributed to Mr. Beharry as a direct result of the counts of conviction) for a total of 263 kilograms of cocaine. These findings were based on a preponderance of the evidence standard. Although defense counsel asked the court to apply the "clear and convincing" standard to its relevant conduct quantities determinations, and the court went on to state that it had so found, such findings by the court were in violation of Mr. Beharry's constitutional due process rights because he was never charged with such quantities; he never had such quantities determined by the jury beyond a reasonable doubt and such quantities were found wholly, and solely, by the court. Indeed, it strains reason to understand how the sentencing court could find (a) that "the evidence in this case absolutely establishes that there was a conspiracy;" (R-587-2978), and (b) go on to sentence the defendant based on quantities beyond the scope of the very conspiracies contained in the indictment on which the jury could not find the evidence sufficient to convict on the counts which the court viewed during trial as "the heart of the case." [*See* R-586-2837]. Such a process resulted in a *de facto* jury verdict nullification by the sentencing court and serves to illustrate the flaw in the reasoning of the cases cited *ante* where the courts base their decisions on what *they may* think the jury *would* have found, or should have found.

Regardless of the quantities unconstitutionally imputed to Mr. Beharry by this flawed process, he was illegally sentenced as (argued in detail *supra*) the court could not have sentenced him to more than that 20 year statutory maximum cited in the catchall 21 U.S.C. §§ 841(b)(1)(C) and 960(b)(3) irrespective of whatever quantities the court erroneously imputed at sentencing. This is so "because a maximum sentence set by statute trumps a higher sentence set forth by the Guidelines." ***Edwards v. United States***, 523 U.S. 511, 515 (1998); USSG § 5G1.1. As Mr. Beharry was sentenced under the Guidelines to life imprisonment (well beyond the statutory maximum) based wholly on quantities which were uncharged and/or quantities for which the jury could not convict, his

sentence must be reversed. To support a contrary finding, this Court would have to consider that, perhaps, jurors should be instructed not to concern themselves so much with *seeking* unanimity on *all* the counts because, as soon as they reach any guilty verdict, the court will take over its duties and sentence the defendant on whatever it (the court) finds—even if such findings are completely contrary to the jury's verdict(s), (or failure to reach a verdict), on any remaining counts.

E. The Circuit Court violated Petitioner's Sixth Amendment rights when it used counsel's quantity arguments at sentencing as a basis for affirming the conviction when such arguments were merely presented as alternative arguments to rebut quantities the Government was imputing for the sole purpose of increasing Petitioner's sentencing exposure.

At Mr. Beharry's sentencing proceeding, defense counsel vigorously disputed the Government's eventually successful attempts to impute quantities of cocaine beyond those attributed to the counts on which the jury reached a verdict. Because the jury reached verdicts of guilty on only the two possession and two importations of February 2, 1993, and February 10, 1993, which allegedly involved an aggregate total of 46 kilograms, counsel, in a pre-***Apprendi*** proceeding, utilized "alternative" arguing solely in an attempt to limit Mr. Beharry's sentencing exposure. Specifically, the following arguments, *inter alia,* were put forth by defense counsel at sentencing:

> ...[t]o begin with, Mr Beharry is convicted of importation of February 2nd which involves 10 kilos of cocaine, and February 10 which involves 36 kilograms of cocaine. No question he has to be held responsible for that. The Government wants you to multiply that by a factor of three so we get in excess of 150 kilos so that they *could get additional punishment*. So we are dealing with a factor of well over three times what the Defendant was convicted of in order to get where they want to go.

(Emphasis added)(R-587-2968).

> I believe the only amounts the Court can use is 46 kilograms of cocaine that were involved in February 2, and February 10.... We would ask the Court to

find only 46 kilograms of cocaine are usable in terms of drug amounts.

(R-587-2971).

These statements must be viewed in the context of Mr. Beharry's sentencing. As the litigation process had ended with the jury's verdict and the sentencing phase had begun, defense counsel above was obviously exercising his duty to limit the sentencing exposure of his client while simultaneously maintaining credibility with the court by adhering to binding precedent in sentencing determinations at the time of the proceedings. After challenging all of the factual allegations in the PSR, including his guilt and drug quantity, Mr. Beharry proceeded to argue that the largest quantity of drugs for which he could be held responsible was the 46 kilograms of cocaine allegedly involved in the two shipments for which he was convicted. Moreover, defense counsel meticulously objected to specific amounts and sources for the PSR's allegations of drug quantity. (R-587- 2968, 2971-72). Thus, taken in context, at no time did Mr. Beharry or his counsel admit that Mr. Beharry was responsible for 46 kilograms of cocaine. Instead, counsel argued in the *alternative* that if any drug quantity were to be attributed to Mr. Beharry, 46 kilograms was the most that could be found.

As is clear from the record, the court eventually sentenced Mr. Beharry on the basis of an additional 217 kilograms of cocaine beyond the 46 kilograms the court attributed to the counts of conviction for a total drug quantity of 263 kilograms of cocaine. These findings served as the basis for Mr. Beharry's term of life imprisonment.

In his Initial Brief on direct appeal to the court below, Mr. Beharry continued to vigorously dispute, *inter alia*, all the drug quantity findings made by the district court.[16] In its Answer Brief, ~~much to Mr. Beharry's~~ astonishment, the Government used defense counsel's alternative arguments on drug amounts at sentencing as a reason for the lower court to affirm the sentence based on the fact that Mr. Beharry had "conceded" drug amounts of 46 kilograms. Specifically, the Answer Brief states: "[i]ndeed, defendant expressly conceded that 46 kilograms of cocaine is the amount of the two importations of which Mr. Beharry was convicted." (See Govt Answer below, pp. 14, 21). Most significantly, in its unpublished opinion, the lower court cited to defense counsel's arguments at

[16]See Pet. App. "2" at 1-60.

sentencing as part of its rationale in affirming Mr. Beharry's conviction and sentence. (Pet. App. "1" at 31). That such arguments by defense counsel, demonstrative of prudent advocacy at the time, came to be used to Mr. Beharry's prejudice, is impermissible and violative of his due process rights under the Fifth and Sixth Amendments of the Constitution. Such an outcome serves to chillingly constrain counsels' advocacy at a critical stage in federal proceedings and leaves defendants to the mercy of quantities alleged in the PSR with merely per functionary objections on which to fall back on appeal.

This Court is asked to determine what exactly constitutes an "alternative argument" made at sentencing and when does such an argument, if ever, become an expressed waiver and/or stipulation with prejudicial binding results for the defendant. Arguing in the alternative has long term acceptance in American jurisprudence. *See* ***Martinez v. Harris,*** 675 F.2d 51, 54 (2nd Cir. 1982) ("Arguing in the alternative is a well-accepted practice. For instance it has been expressly approved in the rules governing federal trials. Fed.R.Civ.P. 8(e)(2). It therefore makes no sense for us to hold that when a state prosecutor acts as a prudent advocate, he waives any of the alternative arguments that he asserts"). *See also* ***Henley v. Coombe,*** 1984, 1984 WL 229 (S.D.N.Y.)("where prosecutor argues appeal on procedural grounds, a federal habeas court should presume the state court based its denial of a defendant's appeal on those independent and adequate state grounds. This is so, even though the prosecutor argued on the merits of the appeal as well"); ***Patmon v. Michigan Attorney Grievance Commission,*** 114 F.3d 1188 (Table), 1997 WL 299377 (6th Cir. Mich)(Unpublished Disposition)("The mere fact that they also presented alternative arguments...does not indicate that the defendants have waived the defense"), *Id.* at *5.

Even within the Eleventh Circuit there are conflicting, unclear dispositions as to the effects of alternative arguments. *Compare* ***United States v. Schrimsher,*** 58 F.3d 608, 610 (11th Cir. 1995)(defense counsel's unambiguous account of the negotiations surrounding the plea agreement seen as a clear *admission* by the Defendant *conceding*, in fact *stipulating*,[17] that the court could order

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[17]The facts of this case are easily distinguishable from the "alternative arguments" issue presented for review as ***Schrimsher*** affirmatively *stipulated* on the record to the loss. The instant case contains no record of any such "stipulation" or expressed waiver. *Id.* at 610.

restitution and thus *waiving* the issue on appeal)(emphasis added), *with* ***United States v. Siegel,*** 153 F.3d 1256, 1263 (11th Cir. 1998)(holding that "a lawyer's professional and courteous submission to a trial court's authority to make a factual ruling on a contested issue should not be construed as a withdrawal of an objection"). The First Circuit, in very succinct comparisons, held the following:

> [c]ounsel who loses a point can neither pout nor play the ostrich, but must move on and confront the next set of issues. Just as a lawyer who moves unsuccessfully for judgment as a matter of law must then give the court his suggested jury instructions on the issue or risk a less-than-favorable charge, so, too, a prosecutor who argues against a departure, loses, and then refuses to offer suggestions referable to the degree of departure runs a comparable risk.

United States v. Rostoff, 53 F.3d 398, 410 (1st Cir. 1995).

The instant case is easily distinguishable from cases where a failure to object to the PSR amounted to an expressed waiver and concession as to the quantity attributed therein. *See* ***United States v. Pruitt,*** 156 F.3d 638, 648 (6th Cir. 1998)(failure to object to PSR seen as "expressly agree[ing] that [defendant] should be held accountable for amount of drugs involved"); or a case where the defendant did raise an objection to the PSR but, similar to the case *sub judice*, alternatively argued to be held accountable for an expressed amount, *see* ***United States v. Nesbitt,*** 90 F.3d 164, 167-68 (6th Cir. 1996)(Defendant objected to PSR report which attributed him with between 150 to 500 kilograms at sentencing. Defendant argued that he should only be held accountable for 139 kilograms. Court of Appeals found that defendant "expressly agreed that he should be held accountable" for 139 kilograms). *See also* ***United States v. Oakley,*** 229 F.3d 1154 (6th Cir. 2000)("[d]efendant who expressly agrees to a fact upon which a guideline range is based is estopped to challenge accuracy of that fact on appeal"). Finally, *see* ***United States v. Choate,*** 101 F.3d 562, 566 (8th Cir. 1996)(holding that defendant claiming that appropriate increase under USSG § 3B.1.1(a, b), was three points for being manager or supervisor, rather than four points for being organizer or leader, waived argument that his criminal activity did not involve five or more participants because, by arguing for three-level increase, rather than four-level increase, defendant was arguing that he should come within the Sentencing

Guidelines applicable if the criminal activity involved five or more participants).

Some of the above cases conflict with each other and with ***United States v. Bjorkman,*** 270 F.3d 482, 492 (7th Cir. 2001) which held that a defendant who pleaded guilty "did not waive the requirement of ***Apprendi*** that drug type and quantity be determined by the trier of fact beyond a reasonable doubt...for sentencing came after the plea." ***Bjorkman*** aptly illustrates the difference the between stipulations and waivers attached to pre-sentencing proceedings and those arguments in the alternative raised at sentencing.

In ***Pate v. Robinson***, 383 U.S. 375 (1966) this Court ruled that where a defendant had failed to demand a sanity hearing as provided by Illinois law, he had not deliberately waived the defense of his competence to stand trial (as the state contended), where counsel insisted throughout the proceedings that sanity was very much an issue. *Id.* at 384. Finally, any of the above cited decisions which impute or imply waivers and/or stipulations to defense counsel's arguments in the alternative at sentencing run afoul of this Court's expressed proscription for waiver of rights as held in ***United States v. Olano,*** 507 U.S. 725, 733 (1993) which stated that a party waives a right when it makes an "intentional relinquishment or abandonment" of such a right; *quoting* ***Jackson v. Zerbst,*** 304 U.S. 458, 464 (1938). Mr. Beharry neither waived nor abandoned any of the quantity issues presented throughout the entire proceedings (pre-trial, trial, post-trial, sentencing, and direct appeal).[18] As a result, the Eleventh Circuit's imputation of the 46 kilograms attributed to Mr. Beharry as "conceded" requires a remand to reconsider the total amount of drugs without imputing same from alternative arguments raised to preserve error.

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[18]Near the close of the sentencing proceedings, when it appeared all but certain that Mr. Beharry would be sentenced to a life term, defense counsel also argued for a downward departure from Guideline level 44 to level 43 which has a sentencing range of 360 months to life imprisonment. This was also an "alternative argument" done solely for the purpose of having Mr. Beharry sentenced "to a term of years rather than life imprisonment." (R-587, P. 3034). Following the logic of the lower court would now preclude appellate counsel from arguing for a lower sentencing range than level 43, based upon any factors, as it can be said that Mr. Beharry "expressly conceded" to level 43. Such a holding would, of course, be insufficient on its face and contrary to all Due Process principles.

II The trial court denied the Petitioner's due process rights when it *Allen* charged the jury after the jury informed the court that they were deadlocked after reaching a verdict on one count, that such a deadlock was unanimous, and one juror had previously requested a bailiff because she feared for her safety due to the conduct of the other jurors.

On Friday, October 29, 1999, after three days of deliberations, the district court received several notes from the jury. The first note stated, "we have considered only one count and we are stuck." (R-586-2810). The second note stated that juror No. 8 (Ms. Carol Best) "does not feel safe in the jury room" and requested the bailiff. (R-586-2810). Thereafter, the judge called the juror to speak with her outside the presence of the other jurors. At that time, the following exchange took place between the court and Juror No. 8:

> COURT: Now, I want to ask you, do you feel or do you have concern for your *physical safety*?
>
> JUROR 8: At certain moments in there, *yes*.

(R-586-2834)(emphasis added). Ms. Best went on to say:

> JUROR 8: When I am being spoken to regarding statements that I have made *which may be contrary to what other jurors feel*, the voice is raised to a very high level. The *comments are directed exactly to me*, I am *commanded*, even if I am looking at a piece of paper, to stop and look and look at whoever.

(R-586-2835)(emphasis added). In response to a direct question concerning her physical safety, Juror 8 responded: "[w]ell I haven't been struck...but *I think that could move to something more physical."* (R-586-2836). The record reflects that Juror 8 was in tears and upset. Further, the above statements clearly denote an individual who is in actual fear for her *physical* safety *from other juror*(s). Upon being singled out, during deliberations, to enter the courtroom outside the presence of the other jurors, there can be no question that Juror 8 was now "on the spot" in the eyes of her fellow jurors. This was not merely a onetime emotional outburst during heated deliberations. Indeed, even the Forelady of the jury was "in

tears as well, or near tears." (R-586-2843).[19]

The court decided to give the jurors a break over the weekend to cool off and return to deliberations of Monday, November 1, 1999. They were also cautioned to be civil to one another.[20] After the jury returned on Monday and resumed deliberations, a third note form the jury was presented wherein they stated, "[w]e are unanimous on Count 5, we are hung on Counts 2, 3, 4, 6, and feel we cannot make any further progress, this is unanimous." (R-586-2846). Thereupon, over defense counsel's objection, the district court gave a modified *Allen* charge. Shortly thereafter, the jury returned guilty verdicts on Counts 2, 3, 5, and 6.[21]

Under the circumstances, such a charge was error because of its potential and actual coercive effects on the minority Juror 8 especially after that Juror had expressed fear for her physical safety. Such an effect was readily apparent to the district court at the time. *See* ***Lowenfield v. Phelps,*** 484 U.S. 231, 232 (1988)("Although coercion is suggested by the fact that the jury returned its verdict soon after receiving the supplemental instruction, defense counsel's failure to object to...the instruction at the time indicates that the potential for coercion argued now was not then apparent"); *see also* ***United States v. Elkins,*** 885 F.2d 775, 783 (11th Cir. 1989)(holding that *Allen* charge is error when it has the effect of coercing the jury). Moreover, Juror 8's note and subsequent discussion with the district court made clear that the pressure she was experiencing, to the point of fear for her physical safety, was a direct result of her deliberations, and not from extraneous prejudicial information. *See* Fed.R.Evid. 606(b). In ***United States v. Norton,*** 867 F.2d 1354 (11th Cir. 1989), the lower affirmed a conviction involving an *Allen* charge precisely because, *inter alia*, the judge *did not* question a juror regarding the duress that juror may have experienced during deliberations. To have done so, the court reasoned, "would itself have risked reversible

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[19]Describing this incident, the district court remarked: "[t]his is a tired jury. They have been battling back and forth, obviously... I think we have a conflicted jury." (R-586-2843).

[20]When asked by the district court (in reference to the "cooling off"), one juror responded: "Easier said than done." (R-586-2841).

[21]Significantly, the jury hung on the broad importation and possession "conspiracy" Counts 1 and 4 respectively. As the district court had acknowledged earlier, Counts 1 and 4 were the "heart of the case." (R-586-2843).

error, since the juror's note made clear that the pressure allegedly placed upon him resulted from discussions between the jurors...." *Id.* at 1366.

In the instant case, although the district court did not poll the jury, there is no doubt that everyone knew that Juror 8 was being singled out in the jury room. The Government's assertions in it's reply brief to the contrary, the record clearly shows that the district court and the Government were aware, in more than general terms, of the status of Juror 8 as being in the minority. Indeed, the district court stated "my suspicion is there may be some unanimity among the jury and one juror who may have a particular position..." (R-586-2812). The court went on to state that "I suppose we are assuming that the split is 11 to one...." (R-586-2853). The court then conceded that it "would be reasonable to surmise that one juror stands by herself, but that is not necessarily so. There may be others in there who share her view but are not as affected as she was by whatever counter arguments were made." (R-586-2854). The Government stated: "I am so sure it is the other 11, if you are the only person arguing one way or the other, you may feel paranoid yourself or more defensive...." (R-586-2821).

An *Allen* charge is by its very nature coercive and intimidating. *See* ***United States v. Rey,*** 811 F.2d 1453, 1460 (11th Cir. 1987)(Although reluctantly upholding the *Allen* charge in the case before it, Judge Edmondson expressed strong misgivings about its propriety and overall coercive and intrusive effect on the jury).

In the case *sub judice*, the district court knew the identity of the Juror in question; had a well-founded belief that such a Juror was in the minority; knew that Juror 8 had fears for her physical safety; and had discussed the issue with the Juror outside the presence of the other jurors. Under these circumstances, giving an *Allen* charge was inherently and unduly coercive. Accordingly, Mr. Beharry is entitled to have his conviction reversed and remanded for a new trial.

CONCLUSION

For all the foregoing reasons, therefore, *Zimmern Beharry* respectfully submits that this Court should grant this Petition for Certiorari.

RHONDA A. ANDERSON, ESQ.
2222 Ponce De Leon Boulevard, Suite 500
Coral Gables, Florida 33134
Florida Bar No. 708038
Tele: (305) 444-1400, Fax: (305) 444-1487

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing was mailed *via* Federal Express, this 22nd day of January, 2002, to: ***Sangita K. Rao, Esq.***, U.S. Department of Justice, P. O. Box 899, Benjamin Franklin Station, Washington, D.C. 20044-0899; and ***Solicitor General,*** Department of Justice, 10th and Constitution Avenue, N.W., Washington, D.C. 20530.

RHONDA A. ANDERSON, ESQ.
Counsel for *Zimmern Beharry*